FILED
OCT 14 1958
JAMES R. BROWNING, Clerk

No. 362

In the Supreme Court of the United States

OCTOBER TERM, 1958

RAYMOND JEREAN KOLLER AND MARTIN SILVERBROOK,
PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The first opinion of the district court is reported at 143 F. Supp. 154, and its memorandum opinion awarding summary judgment to the United States appears at page 20a of petitions' appendix in the court of appeals. The opinion of the court of appeals (Pet. App. 11-16) is reported at 255 F. 2d 865.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1958 (Pet. App. 11). The petition for a writ of certiorari was filed September 13, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a suit for damages under Section 26(b)(1) of the Surplus Property Act, which requires the payment of $2,000 for each violation of the Act plus double the amount of any damage which the United States may have sustained thereby, is an action for a "civil fine, penalty, or forfeiture," and thus subject to the five-year limitation period of 28 U.S.C. 2462.

STATUTES INVOLVED

Section 26(b) of the Surplus Property Act of 1944, 58 Stat. 780, 50 U.S.C. App. (1946 ed.) 1635(b), now codified as Section 209(b) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 392, 40 U.S.C. (1952 ed.) 489(b), provides in pertinent part:

> (b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property hereunder—
>
> (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be.

Act of June 25, 1948, 62 Stat. 974, 28 U.S.C. 2462, provides as follows:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

STATEMENT

The United States instituted this civil suit under Section 26(b) (1) of the Surplus Property Act of 1944, *supra*, p. 2, to recover the sum of $2,000 and double damages for each of several fraudulent transactions engaged in by petitioners (Pet. App. 11). The district court held that petitioners' previous pleas of

guilty to indictments under 18 U.S.C. 80 for these identical acts conclusively established the issue of fraud against them in this civil suit and awarded summary judgment for the United States in the amount of $6,000, that is, $2,000 for each of three acts (Pet. App. 11-12). Petitioners thereupon appealed to the United States Court of Appeals for the Third Circuit, alleging that the Government's claims were barred by limitations (Pet. App. 12). They contended that Section 26(b)(1) of the Surplus Property Act, in providing for the recovery of $2,000 for each violation, imposed a civil penalty within the meaning of 28 U.S.C. 2462, *supra*, p. 3, and accordingly that this suit was subject to the five-year limitation which that statute sets on any suit for the enforcement of a "civil fine, penalty, or forfeiture." They pointed out that the complaint in this case was not filed until more than nine years after they had committed these fraudulent acts, and argued that this suit was therefore time-barred (Pet. App. 12).

The court of appeals rejected this contention, holding (Pet. App. 11-16) that "Section 26(b)(1) does not provide for a penalty but is remedial in nature" (Pet. App. 14). The court stated this question had been settled by the decision of the Supreme Court in *Rex Trailer Company* v. *United States*, 350 U.S. 148, holding that the $2,000 statutory sum provided in Section 26(b)(1) "is comparable to a recovery under a liquidated damage provision which fixes compensation for anticipated loss" (Pet. 16). The opinion also cited this Court's earlier decision in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, which held that a similar provision in the False Claims Act, 31 U.S.C.

231, likewise constituted a compensatory civil remedy (Pet. App. 14). On the basis of these decisions and its own examination of the statute, the court of appeals affirmed the judgment for the United States (Pet. App. 16).

ARGUMENT

The sole issue raised by petitioners is whether an action for damages under Section 26(b)(1) of the Surplus Property Act of 1944, *supra*, p. 2, is penal rather than remedial, and thus subject to the provisions of 28 U.S.C. 2462, *supra*, p. 3, which set a five-year limitation on suits to enforce civil penalties. We submit that this Court has definitely determined this question adversely to petitioners in *Rex Trailer Co.* v. *United States*, 350 U.S. 148, and accordingly that both courts below properly rejected petitioners' contentions.

In *Rex Trailer*, this Court held that the defendant, which had already been criminally convicted for the same fraudulent acts, was not subjected to double jeopardy by a subsequent action to recover the damages provided in Section 26(b)(1). The Court stated that these statutory damages are remedial only, intended like other liquidated damages provisions merely to make the Government whole where actual damages "* * * are uncertain in nature or amount or unmeasurable * * *." 350 U.S. at 153. The opinion pointed out that such "[l]iquidated-damage provisions, when reasonable, are not to be regarded as penalties" (350 U.S. at 151), and concluded that the measure of recovery fixed by this section—and "clearly intended as a civil remedy"—was not so unreasonable as to be transformed into a penalty. 350 U.S. at 154.

Despite the comprehensive language of the *Rex Trailer* decision, petitioners argue that the case decided

only that the sanction of Section 26(b)(1) was not a *criminal* penalty, but did not determine whether the statute provided for a *civil* penalty. This contention is plainly erroneous. For, although the narrow issue in *Rex Trailer* itself was the double jeopardy question, this Court expressly stated that, in reviewing the Seventh Circuit's decision in that case, it was also undertaking to resolve the conflict between the Fifth and Sixth Circuits on precisely the question petitioners raise here—whether the limitations provision of 28 U.S.C. 2462 governing suits for civil penalties applied to an action for damages under Section 26(b)(1) of the Surplus Property Act.[1] And both the language and the rationale of the *Rex Trailer* opinion leave no question as to the Court's conclusion on this question; the decision makes clear time and again that in no sense can the liquidated damages provision of Section 26(b)(1) be considered a penalty of any kind, either civil or criminal. Thus, the Court emphasized the remedial nature of Section 26(b)(1) by comparing the damages provided in that section with the remedies of 26(b)(2) and (3), which expressly provide for the recovery of "liquidated damages"; the opinion pointed out (350 U.S. at 151) that all three subsections were recognized by Congress as providing for "civil remedies," and concluded that all three

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[1] See 350 U.S. at 149, fn. 2, citing *United States* v. *Weaver*, 207 F.2d 796 (C.A. 5) and *United States* v. *Witherspoon*, 211 F.2d 858 (C.A. 6). Indeed, it was because of this conflict that the United States did not oppose the granting of certiorari in *Rex Trailer*. Although arguing that the Seventh Circuit had correctly decided the *Rex Trailer* case itself, the Government stated that it believed the conflict between the Fifth and Sixth Circuits on the applicability of 28 U.S.C. 2462 to suits under the Surplus Property Act required a "determination of the nature of the sanction provided by Section 26(b)(1) * * *." Memorandum for the United States, No. 46, October Term, 1955, p. 15.

are intended to perform the same purpose of indemnifying the Government for the injury actually done to it.[2] The Court further noted (350 U.S. at 152) that in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, it had held an essentially equivalent provision in the False Claims Act, 31 U.S.C. 231, to be "remedial and not penal, since it was unable to say that the provision for $2,000 plus double damages would 'do more than afford the government complete indemnity for the injuries done it.' 317 U.S. at 549."[3] And, finally, the Court expressly rejected the contention that 26(b)(1) provided for a penalty because it permitted recovery without proof of actual damage. The opinion pointed out that the Government was undoubtedly injured by the Rex Trailer Company's fraudulent acts, and that since these damages were difficult or impos-

[2] The court of appeals in the present case likewise pointed out with respect to the three subsections of Section 26(b) (Pet. App. 14-15):

> * * * The latter two [subsections] clearly provide for multiple damages in the form of or as liquidated damages. These two subsections provide without question a remedy clearly compensatory in nature. Both the wording of Section 26(b) and the pertinent Committee Report, S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14, show that the United States was to have the option of selecting as its remedy any one of the three different measures of damages. It is a reasonable construction of the section that Congress intended all three subparagraphs of Section 26(b) to be *in pari materia*. We cannot hold that Congress intended that the first of the three subsections set up a penalty section and the other two provided merely for compensatory liquidated damages.

[3] The *Rex Trailer* opinion also cites and relies upon *Helvering* v. *Mitchell*, 303 U.S. 391, holding that a 50 percent assessment upon those who committed fraud under the Revenue Act of 1928 was not a penalty, but rather a civil administrative sanction of a remedial nature. See also *Scadron's Estate* v. *Commissioner*, 212 F. 2d 188 (C.A. 2), certiorari denied, 348 U.S. 832; *Kirk* v. *Commissioner*, 179 F. 2d 619 (C.A. 1); *Reimer's Estate* v. *Commissioner*, 180 F. 2d 159 (C.A. 6).

sible to ascertain, they were properly compensated for by recovery of a lump sum in liquidated damages (350 U.S. at 153).

We submit that this Court has thus definitively determined the remedial nature of the damage provision of Section 26(b)(1) of the Surplus Property Act. Both courts below so held, and on that basis rejected petitioners' contention that the Government's suit under this section was barred by the statute of limitations applicable to suits for civil penalties. This determination was clearly correct, and warrants no further review here.

Although the decision of the court below is inconsistent with that of the Court of Claims in *Erie Basin Metal Products, Inc.* v. *United States*, 150 F. Supp. 561, we believe that in *Rex Trailer* this court clearly intended to resolve the conflict which then existed in a way contrary to that adopted by the Court of Claims and that that court has misinterpreted the decision of this Court. Since the ruling of the Court of Claims was interlocutory it has not been appropriate to seek review of it, but if that court continues to adhere to its conclusion, it may be necessary at some later time to ask this Court to rule on the issue again.[4]

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[4] Both courts below (Pet. App. 13-14), as well as other federal courts, have interpreted the decision in *Rex Trailer* as putting to rest the conflict on this question whether the damage provision of Section 26(b)(1) constituted a civil penalty within the meaning of 28 U.S.C. 2462. See *United States* v. *Hougham*, 148 F. Supp. 715 (S.D. Calif.); *United States* v. *Schneider*, 139 F. Supp. 826 (S.D. N.Y.); dissenting opinion of Judge Madden in *Erie Basin Metal Products, Inc.* v. *United States*, 150 F. Supp. 561, 566-7 (C. Cls.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1958.

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